

Editor's note: appealed -- Civ.No. 91-0472-E EJL (D. ID., Nov. 6, 1991); sum. judg. granted April 1, 1994; appeal filed -- No. 94-35514 (9th Cir. April 18, 1994)

JOHN D. ARCHER

IBLA 90-10

Decided September 6, 1991

Appeal from a decision of the Area Manager, Pocatello Resource Area, Idaho, Bureau of Land Management, granting phosphate slurry pipeline right-of-way. I-26281.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way-- Rights-of-Way: Conditions and Limitations

BLM properly declines to condition a grant of a slurry pipeline right-of-way on a requirement that the pipeline be operated as a common carrier for the benefit of other producers of phosphate ore where no statute requires such operation and there is no demonstration that such a condition is necessary to protect competition, future development of phosphate reserves, or the environment.

APPEARANCES: E. Craig Smay, Esq., Salt Lake City, Utah, for appellant; Terry T. Uhling, Esq., J. R. Simplot Company, Pocatello, Idaho, for the J. R. Simplot Company.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

John D. Archer has appealed from a decision of the Area Manager, Pocatello Resource Area, Idaho, Bureau of Land Management (BLM), dated September 21, 1989, granting a phosphate slurry pipeline right-of-way, I-26281, to the J. R. Simplot Company (Simplot), pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1761-1771 (1988).

The subject right-of-way, which was granted by BLM for a term of 30 years, is broken into six parts, each of which crosses public domain land, and, overall, is 50 feet wide and 4.8 miles long. 1/ The 9-inch diameter pipeline to be constructed within the right-of-way is designed to be part of a 58-mile underground pipeline, which will cross not only public domain but national forest and private land for the purpose of carrying phosphate ore, produced at Simplot's Smoky Canyon Mine in Caribou

1/ The right-of-way crosses public domain land in secs. 8, 9, and 25, T. 6 S., R. 35 E., secs. 7 through 9, T. 7 S., R. 38 E., and secs. 3 and 4, T. 8 S., R. 40 E., Boise Meridian, Idaho.

County, Idaho. The ore will be delivered in a slurry by pipeline to Conda, Idaho, and from that destination to Simplot's fertilizer manufacturing plant in Pocatello, Idaho, thereby bypassing the railroad.

Prior to granting the subject right-of-way, BLM, in conjunction with the Forest Service, had prepared an Environmental Assessment (EA) in July 1989 in order to assess the environmental consequences of such a grant. ^{2/} During the course of preparation of the EA, comments were solicited from interested parties and the public. Comments were received from Archer, who asserted that BLM should consider, as a part of its authorization of a right-of-way, whether to require Simplot to operate the pipeline as a common carrier, so as to afford "operators of nearby properties [in the vicinity of its Conda operations] * * * [a] reasonable opportunity to ship in the line upon payment of an appropriate share of expenses" (Letter to BLM, dated Apr. 21, 1989, at 2).

By letter dated May 18, 1989, the Acting State Director, Idaho, BLM, informed Archer that BLM had determined that it "is not authorized to require common carrier use on FLPMA R/W grants." (Emphasis added.) However, this view was subsequently changed. In a June 22, 1989, letter to Archer, the State Director, Idaho, BLM, stated that "[p]ursuant to [FLPMA], the BLM is not mandated to require common use of the pipeline in question." Id. at 1 (emphasis added). He further stated that "[s]uch a requirement may be made where circumstances merit it, such as for environmental reasons." Id. Thereafter, Archer submitted another comment, asserting that BLM should simply require Simplot to operate the proposed pipeline as a common carrier. He further stated that BLM should consider the adverse impact of allowing Simplot exclusive use of the pipeline, thus requiring competitors to build another pipeline, from the standpoint of its effect on competition and the environment.

Meantime, BLM also sought an informal opinion from the Interstate Commerce Commission (ICC) concerning whether BLM should require the proposed pipeline to be a common carrier. By letter dated May 23, 1989, the Director, ICC, responded, at page 1, that the ICC "does not make any determination as to whether a pipeline is to be a common carrier." However, the Director noted that, in the case of Ashley Creek Phosphate Co. v. Chevron Pipe Line Co., 5 I.C.C. 2d 303 (1989), Chevron U.S.A., as the owner of a pipeline that carried phosphate slurry across state lines, agreed, as a condition of issuance of a BLM right-of-way grant, to operate the pipeline as a common carrier where BLM had desired to limit the number of pipelines in order to protect an environmentally sensitive area. See id. at 304 n.4. Contrasting Ashley Creek with the present case, the Director stated: "There is no indication in [BLM's] letter that [Simplot] intends to operate its

^{2/} The Forest Service was involved because it was considering whether to issue a special use permit for the portion of the Conda-Pocatello pipeline which crosses national forest lands. Based on the analysis in the EA, the Forest Supervisor, Caribou National Forest, Forest Service, decided to go ahead with issuance of a special use permit in a Sept. 5, 1989, Decision Notice and Finding of No Significant Impact.

pipeline as a common carrier in interstate commerce," rather than a "private carrier * * * using the pipeline only to carry its own goods in intrastate operations."

Indeed, Simplot informed BLM, by letter dated June 7, 1989, regarding whether the proposed pipeline should be operated as a common carrier, that the line was "designed to carry only enough ore to supply the [Pocatello] Plant." It further stated: "There will be no time for use by anyone other than ourselves" because, once the ongoing expansion of the Pocatello facility is completed, "[it] will take all of the ore that the pipeline will be capable of transporting."

In the EA, BLM, agreeing with the Forest Service, concluded there was no need to consider whether the pipeline should be operated as a common carrier where "[t]here have been no agreements, statements of need, or financial commitments to indicate an interest or a willingness in sharing development and construction costs" and, in any case, "Simplot is not interested in initiating or implementing such arrangements" (EA at 3-17). It was observed that Simplot intended to operate the pipeline "as a component of [its] fertilizer manufacturing process, not as a commercial service to multiple customers":

As proposed, Simplot's pipeline and associated facilities have been designed to transport ore from Simplot's Conda facility to its Pocatello facility at full capacity for seven days a week and 24 hours a day. Excess capacity in the pipeline would not be available and Simplot is not obligated to expend capital costs to expand the capacity of the pipeline for use by others.

Id.

By letter dated August 15, 1989, Archer challenged the conclusion by the EA that the pipeline need not be operated as a common carrier where Simplot did not intend to afford access to the line to other producers. Rather, Archer argued that, under the Act of October 17, 1978, as amended, 49 U.S.C. § 10501(a) (1988), transportation of a commodity other than water, gas or oil is subject to the jurisdiction of the ICC, thereby requiring operation as a common carrier, where it occurs "by pipeline and railroad * * * between a place in * * * a State and a place in another State." He contended that this will happen in the present case, because the phosphate ore mined and milled by Simplot is to be transported by the proposed pipeline to Pocatello "where it will meet the Union Pacific Railroad for shipment outside of Idaho" (Aug. 15, 1989, Letter at 2).

Further, assuming that BLM concluded in error that no other producers were interested in using the proposed pipeline ^{3/} Archer argued that BLM

^{3/} The Aug. 15, 1989, letter stated that the conclusion in the EA, at page 3-17, that no arrangements regarding common use of the proposed pipeline had been proposed was, "at best, deceptive," because: "John D.

should afford such producers an opportunity to express their interest in utilizing the proposed pipeline and to show their willingness to share its expenses. Finally, Archer contended that BLM should consider the impact on competition and future development of phosphate reserves of allowing Simplot sole use of the pipeline, where other producers would then be left with the more expensive options of using the railroad or constructing a second pipeline. ^{4/}

On September 5, 1989, the Area Manager issued a Decision Record and Finding of No Significant Impact. Therein, he concluded that the proposed right-of-way would not have a significant impact on the human environment and decided to issue the right-of-way, subject to recommended mitigating measures.

On September 6, 1989, BLM responded to Archer's August 1989 letter indicating that the proposed pipeline was not subject to ICC jurisdiction where it "is designed for internal company use and is expected to be operated by Simplot at full capacity." BLM also addressed Archer's contention that the pipeline fell within ICC's jurisdiction because after the phosphate ore was shipped to Pocatello it would then be transported by railroad outside Idaho: "While this, in one sense, is true, the product shipped outside of Idaho will require processing at Simplot's Pocatello facility and, therefore, is not the same product that will be transported through the slurry pipeline."

BLM granted the subject right-of-way, effective on September 20, 1989. Nothing contained in the terms and conditions of the grant required Simplot to operate the authorized pipeline as a common carrier. Archer has appealed from that grant. In his statement of reasons for appeal (SOR), he contends that, in deciding to grant the subject right-of-way, BLM failed to consider the impact on competing phosphate producers and the environment of not requiring Simplot, as a condition of the grant, to operate the authorized pipeline as a common carrier, in accordance with sections 501(b)(1) and 505 of FLPMA, as amended, 43 U.S.C. §§ 1761(b)(1) and 1765 (1988). Archer argues that Simplot is required to operate the pipeline as a common carrier because it carries on interstate transportation of phosphate ore by pipeline and railroad, citing Maryland v. Louisiana, 451 U.S. 725 (1981). ^{5/} Unless

fn. 3 (continued)

Archer, who, under arrangement with Alumet and Southwire, controls substantial phosphate deposits in the vicinity, has repeatedly expressed interest in participating in the pipeline" (Aug. 15, 1989, Letter at 2).

^{4/} Archer also argued that BLM should solicit an "informal opinion of the I.C.C. staff" regarding the "public or private nature of the line proposed" (Aug. 15, 1989, Letter at 3). Arguably, that opinion had already been provided to BLM in the form of the May 1989 letter from the Director, ICC.

^{5/} In Maryland, the Court concluded that the transportation by pipeline of natural gas produced from offshore wells to processing plants in Louisiana and then to consumers in other states constituted interstate commerce, for

the pipeline is operated as a common carrier, he contends, Simplot will have a virtual monopoly on the transportation of phosphate ore while other producers, given the low cost of slurry versus rail operations, will have to build their own pipelines, which may not be either economically feasible or environmentally desirable, all factors which BLM should have considered but did not.

Archer argues that, in the area "near Conda," there are other producers of phosphate ore who "might use [Simplot's] pipeline" (SOR at 2). However, with the exception of himself he does not identify these other producers. Nonetheless, for the purposes of this decision, we will assume that there are a number of other producers who might desire to use Simplot's pipeline. 6/

Archer also asserts that the phosphate ore carried by pipeline to Simplot's facility in Pocatello will then be either dried and transported by railroad to points outside of Idaho or refined for use as fertilizer and then similarly transported. See SOR at 2. Simplot does not dispute that the ore will be refined for use as fertilizer, but contends that the ore "loses its identity after it is processed in Pocatello" (Answer at 3). 7/ Simplot does, however, dispute Archer's assertion that it will ship unrefined ore outside of Idaho, replying that, in connection with ore presently mined at its Smoky Canyon Mine, transported by pipeline to Conda and then shipped by rail to Pocatello, it does not ship such ore outside of Idaho. In the absence of proof to the contrary, we conclude that Simplot does not ship unrefined ore outside of Idaho and does not intend to do so in the future.

fn. 5 (continued)

purposes of determining the constitutionality of a Louisiana tax on the gas under the Commerce Clause of the U.S. Constitution. See Maryland v. Louisiana, supra at 754-56.

6/ Archer has stated that BLM should have solicited other potential shippers regarding their interest in participating in the subject pipeline. See Letter to BLM and Forest Service, dated Aug. 15, 1989, at 3. We are reluctant to impose such a specific duty on BLM where it is clear that the EA was widely circulated and a lengthy opportunity was afforded to the public, including such potential shippers, to express their concerns regarding the pipeline, including their desire to participate in its construction and operation.

7/ Simplot describes the processing of the phosphate ore:

"The calcium phosphate mineral is reacted with sulfuric acid which creates a new chemical compound. The calcium phosphate mineral's reaction with sulfuric acid produces weak phosphoric acid with gypsum as a by-product. The weak phosphoric acid is then utilized to make fertilizer products. These fertilizer products are phosphoric acid fertilizer products and ammoniated phosphoric acid fertilizer products."

(Answer at 3).

On appeal to this Board, Archer argues first that Simplot is required to operate its pipeline as a common carrier. If it is determined that Simplot must operate the subject pipeline as a common carrier, it is well established at common law, as codified in the Interstate Commerce Act, that this means Simplot is obligated to make the pipeline available for the transportation of any phosphate ore, whether produced by Simplot or another producer, and that Simplot cannot lawfully refuse to transport such ore. See, e.g., American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Railway Co., 387 U.S. 397, 406 (1967); Denver Petroleum Corp. v. Shell Oil Co., 306 F. Supp. 289, 303 (D. Colo. 1969); 13 Am. Jur. 2d, Carriers § 2 (1964).

[1] BLM's authority for granting rights-of-way for pipelines to be utilized for slurring phosphate ore is contained in Title V of FLPMA and its implementing regulations, 43 CFR Part 2800. There is nothing in either the statute or the regulations requiring the holder of such a right-of-way to operate the authorized pipeline as a common carrier. See Exxon Corp., 97 IBLA 45, 51, 94 I.D. 139, 142 (1987), aff'd, Exxon Corp. v. Lujan, 730 F. Supp. 1535 (D. Wyo. 1990), appeal filed, No. 90-8036 (10th Cir. Apr. 3, 1990).

Prior to revision in 1978, the Interstate Commerce Act provided that "common carriers" who engaged in the interstate transportation of a commodity other than water and gas by pipeline or by pipeline and railroad were subject to the jurisdiction of the ICC and, as such, were required to continue to operate as common carriers. 49 U.S.C. § 1(1) (1976); see 49 U.S.C. § 1(4) (1976); The Pipe Line Cases, 234 U.S. 548, 560 (1914). Furthermore, such jurisdiction extended not only to those pipelines who actually operated as common carriers by openly offering their services to the public but also to private carriers who operated as common carriers by forcing producers to sell to them and thereby to use their services. 8/ See United States v. Champlin Refining Co., supra at 298; 9/ see also The

8/ However, as the Court also recognized in United States v. Champlin Refining Co., 341 U.S. 290 (1951), the jurisdiction of the ICC was not intended to encompass private carriers, even where they moved a regulated commodity in interstate commerce, where they did not "exploit a competitive advantage simply by refusing to deal with independent producers having no comparably cheap method of reaching consuming markets" and, thus, did not force other producers to use their lines. United States v. Champlin Refining Co., supra at 298 (emphasis added).

9/ Champlin Refining represented a retreat from a half-hearted pronouncement by the Court in an earlier Champlin Refining case which, in interpreting the jurisdiction of the ICC under the Interstate Commerce Act, rendered all pipeline companies common carriers for purposes of regulation by the Act. See Champlin Refining Co. v. United States, 329 U.S. 29, 33-34 (1946). Rather, the Court held that there must be some indicia of the "evil" which the Act was designed to remedy before the jurisdiction of the ICC was justifiably invoked. See United States v. Champlin Refining Co., 341 U.S. at 297-98.

Pipe Line Cases, *supra* at 560. Thus, a determination that certain transportation was subject to the jurisdiction of the ICC necessarily meant it had been determined that it was being furnished by a common carrier. In 1978, the Interstate Commerce Act was revised to provide that the ICC had jurisdiction over the "transportation [of a commodity other than water, gas, or oil] * * * by pipeline or by pipeline and railroad * * * between a place in * * * a State and a place in another State" (49 U.S.C. § 10501(a) (1988)). This jurisdictional grant to the ICC embraces "pipeline carriers" which includes parties "providing pipeline transportation for compensation." 49 U.S.C. § 10102(19) (1988).

It is argued by Archer that where Simplot is to be engaged in interstate transportation, it is necessarily a common carrier. *See* SOR at 4. This argument, however, assumes that because a company is engaged in such transportation, it is a common carrier. That is not the case. Even as originally enacted, status as a common carrier under the Act and engaging in interstate transportation were separate requirements for ICC jurisdiction; satisfying one requirement did not mean satisfaction of the other. *See Walling v. Rockton & Rion R.R.*, 54 F. Supp. 342, 347 (W.D.S.C. 1944), *aff'd*, 146 F.2d 111 (4th Cir. 1944). Appellant has made no showing that Simplot intends to operate as a "pipeline carrier," *i.e.*, to provide "pipeline transportation for compensation." 49 U.S.C. § 10102(19) (1988). Nothing in the Interstate Commerce Act, either prior to 1978 or now, required or requires a transporter of a regulated commodity to begin operating as a common carrier. Therefore, the Director, ICC, was correct in stating, in her May 1989 letter, that the ICC "does not make any determination as to whether a pipeline is to be a common carrier." (Emphasis added.)

Nevertheless, while the ICC does not decide whether a particular carrier is to be a common carrier, it must still decide whether a carrier is in fact operating as a common carrier, as is illustrated by the Ashley Creek case. Such a decision may again require the ICC to review the activities of so-called private carriers. *See Akron, Canton & Youngstown Railroad Co. v. I.C.C.*, 611 F.2d 1162, 1166-68 (6th Cir. 1979), *cert. denied*, 449 U.S. 830 (1980).

All of this, however, is outside the scope of BLM's responsibility at the time it decides whether to issue a right-of-way grant. *See James I. Thompson*, 51 IBLA 154, 161-62 (1980). Whether the subject pipeline is in fact operated as a common carrier must be decided by the ICC, in accordance with the Interstate Commerce Act, after operation of the pipeline begins. ^{10/} The fact remains that appellant has failed to establish, and

^{10/} In passing, we question whether Simplot can be required under the Interstate Commerce Act to operate the subject pipeline as a common carrier, *i.e.*, required to transport the ore of other producers upon request. As we read the statute, not only must Simplot actually operate the pipeline as a

we cannot discern, that there is an "a priori" statutory requirement that Simplot operate the subject pipeline as a common carrier, which requirement must be incorporated in the terms and conditions of the subject right-of-way.

The next question before us on appeal concerns whether BLM should require Simplot to operate the pipeline as a common carrier, as that is understood under the common law, although such operation is not required by any statute. See Marathon Oil Co., 83 IBLA 137, 142 (1984).

Generally speaking, BLM may condition a right-of-way so long as it reflects a due regard for the public interest and is not inconsistent with or does not unduly burden the right-of-way. See James B. Loonan, 82 IBLA 395, 397 (1984); Ute Water Conservancy District, 47 IBLA 71, 73 (1980) (requiring public access to permitted site); Grindstone Butte Project, 18 IBLA 16, 19, 21 (1974), rev'd, Grindstone Butte Project v. Kleppe, No. 1-76-173 (D. Idaho Sept. 8, 1977), rev'd, 638 F.2d 100 (9th Cir.), cert. denied, 454 U.S. 965 (1981).

At the outset, it is undoubted that BLM has authority to require a right-of-way holder to operate an authorized pipeline as a common carrier in certain circumstances, consistent with the broad discretion accorded to BLM under FLPMA. 11/ Cf. Glenwood Mobile Radio Co., 106 IBLA 39 (1988)

fn. 10 (continued)

common carrier, but the transportation in which it is engaged, which transportation must be made available upon request, must be subject to the jurisdiction of the ICC. See 49 U.S.C. § 11101(a) (1988). This means that the transportation must be interstate in nature. See 49 U.S.C. § 10501(a) (1988). In the present case, Simplot will not itself be involved in the interstate transport of phosphate ore. Its carriage of the ore by pipeline will only be intrastate, whereupon, after processing, control over the resulting product will be transferred to the Union Pacific Railroad for transportation to other states. See SOR at 4. This situation can be contrasted with that in Ashley Creek, where Chevron was admittedly subject to the jurisdiction of the ICC where it transported phosphate ore by slurry pipeline across a state line. Furthermore, the processing of the ore may be sufficient to break the continuity of movement, thus rendering Simplot's portion of the transportation intrastate. See 15A Am. Jur. 2d, Commerce § 70 (1976).

11/ The precise manner of Simplot's operation of its pipeline as a common carrier is, however, outside the jurisdiction of this Department. Indeed, in Chapman v. El Paso Natural Gas Co., supra at 51, the court concluded that, even where section 28(r) of the Mineral Leasing Act, as amended, 30 U.S.C. § 185(r) (1988), expressly requires oil and gas pipelines to be operated as common carriers, the Secretary does not have the authority to prescribe the manner of operation as a common carrier. It is equally clear that, in the case of FLPMA rights-of-way where the statute makes no express provision for operation as a common carrier, the Secretary is similarly not authorized.

(limiting authorized site to multi-user facility under FLPMA); Marathon Oil Co., *supra* at 143 (requiring affirmative action under Mineral Leasing Act). That is best illustrated by BLM's actions in the case of Ashley Creek. ^{12/} When BLM must venture into areas normally within the province of another Federal agency (here, ICC), it is clearly permissible to do so in the exercise of BLM's authority to grant rights-of-way, where BLM is entrusted with ensuring that the public lands are properly utilized. *See* Peregrine Broadcasting Co., 62 IBLA 133, 138-39 (1982) (questions of interference involving right-of-way application for radio broadcasting station).

Section 501(b)(1) of FLPMA provides that, prior to granting a right-of-way, the Secretary shall require the applicant to submit "information reasonably related to the * * * intended use * * * of the right-of-way, including its effect on competition, which he deems necessary to a determination * * * as to * * * the terms and conditions which should be included in the right-of-way." 43 U.S.C. § 1761(b)(1) (1988) (emphasis added.) In accordance with this statutory language, BLM may establish the terms and conditions of a right-of-way based on the affect of the intended use on competition. Thus, BLM could require operation of a pipeline as a common carrier where to do otherwise might adversely affect competition.

Further, section 505 of FLPMA, 43 U.S.C. § 1765 (1988), provides that rights-of-way "shall contain * * * terms and conditions which will * * * protect the environment." Thus, BLM may establish the terms and conditions of a right-of-way depending on the effect of granting the right-of-way on the environment. Moreover, section 503 of FLPMA, 43 U.S.C. § 1763 (1988), provides that the "utilization of rights-of-way in common shall be required" in order "to minimize adverse environmental impacts and the proliferation of separate rights-of-way." *See* 43 CFR 2801.1-1(a) (BLM retains authority to require "common use"). Therefore, BLM could require operation of a pipeline as a common carrier in order to protect the environment.

The question then becomes whether, in the present case, BLM should require Simplot, as a condition of its right-of-way grant, to operate the subject pipeline as a common carrier. In order to decide this question, BLM must consider the impact to the environment of not requiring such operation. *See* Sierra Club, Inc., 92 IBLA 290 (1986). Archer contends that BLM failed to do so. His contention that the subject pipeline should be operated as a common carrier is based first and foremost on his assertion that it will be more expensive for other producers to either use the existing railroad or build another pipeline for the purpose of shipping their phosphate ore, thus affording Simplot a distinct competitive advantage. ^{13/}

^{12/} In his June 22, 1989, letter to appellant, the State Director stated that, while BLM was not mandated by FLPMA to require operation of an authorized pipeline as a common carrier, "[s]uch a requirement may be made where circumstances merit it, such as for environmental reasons."

^{13/} That BLM has, as a matter of practice, considered the economic impact of a proposed action in somewhat similar circumstances is best illustrated in Western Gas Supply Co., 86 IBLA 258 (1985). Therein, BLM considered the

He has, however, presented no evidence that BLM's failure to require Simplot to operate the subject pipeline as a common carrier will afford Simplot a competitive advantage. Nevertheless, we conclude that that will be the case. In applying for a grant of this right-of-way, Simplot stated that it desired to employ the pipeline to assure Simplot's position "as a cost-efficient and highly competitive producer of high quality fertilizer products," stating: "For its part, the pipeline is expected to reduce our ore transportation costs by well over one million dollars annually" (Letter to BLM, dated Sept. 19, 1988, at 1). Clearly, other producers, without access to the pipeline, who are required to either use the railroad or construct another pipeline, would, to some extent, be at a competitive disadvantage. However, it is impossible to gauge the extent of that relative disadvantage in the absence of any proffer of evidence by Archer regarding, at least, the costs of using the railroad or constructing another pipeline compared to the cost of sharing in construction and operation of the subject pipeline and, most importantly, the extent to which such costs would affect the pricing of the products of Simplot versus those of other producers. 14/

In the EA, at page 3-17, BLM and the Forest Service concluded that there was "unlikely" to be any substantial negative effect on competing producers from not requiring Simplot to operate the pipeline as a common carrier where alternative rail service was available and another pipeline could be constructed. BLM considered, albeit briefly, the impact on competing producers of not requiring common carrier operation, but concluded that the impact would be insignificant. Appellant plainly disagrees. However, this disagreement is not sufficient to establish error in the EA. See Dorothy A. Towne, 115 IBLA 31, 39 (1990).

fn. 13 (continued)

economic impact on the owner of a natural gas pipeline and its customers of granting a right-of-way for another such pipeline in terms of lost sales of gas. See id. at 259. Here, it is argued that BLM should, likewise, consider the economic impact on other producers of phosphate ore, in terms of increased costs of shipment of the ore, of not requiring, as a condition of the right-of-way grant, Simplot's pipeline to be operated as a common carrier. While we assume for purposes of this decision that BLM properly considers the purely economic impact of a proposed action, there is a question whether this is required by the instruction in section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (1988), that Federal agencies consider the impact on the "quality of the human environment." See, e.g., Citizens Committee Against Interstate Route 675 v. Lewis, 542 F. Supp. 496, 531-37 (S.D. Ohio 1982). Without deciding the issue, we note that section 501(b)(1) of FLPMA may separately provide authority for BLM to assess the economic impact of granting a right-of-way from the standpoint of the impact on competition.

14/ The sum total of appellant's evidence regarding costs and pricing is encapsulated by his statement that, "[i]f pipeline transport were not cheaper and did not provide a competitive advantage, Simplot would not be building it" (Letter to BLM and Forest Service, dated Aug. 15, 1989, at 3).

Archer also suggests that increased costs which will be experienced by competing producers as a result of their need to rely on the railroad or construct another pipeline will hamper "future development" of other phosphate reserves in the subject area (Letter to BLM, dated Apr. 21, 1989, at 2). See also Letter to BLM and Forest Service, dated Aug. 15, 1989, at 3. BLM concluded, however, that there may only be "some" effect on future development from not requiring common carrier operation (EA at 3-17). At the very least, this demonstrates BLM's consideration of the effect on future development of not requiring common carrier operation.

Archer also contends that the subject pipeline should be operated as a common carrier because to do otherwise will result in a proliferation of similar rights-of-way, which "may" adversely affect the environment (SOR at 3). He has failed to point out in what way authorization of another pipeline right-of-way will adversely affect the environment. In the EA, at page 3-17, BLM and the Forest Service concluded: "[C]onstruction of another pipeline in the area, preferably in the same right-of-way as the proposed pipeline, is environmentally viable. The condition of the environment in the project area is not so sensitive that introduction of another pipeline would be precluded." Appellant has not shown any error in this conclusion or that BLM erroneously concluded that a common carrier stipulation is not required in the public interest. There is no evidence that proliferation of pipeline rights-of-way is likely to take place as a result of BLM's decision not to require common carriage on the subject pipeline (see Eugene V. Vogel, 52 IBLA 280, 286, 88 I.D. 258, 261 (1981)), so that BLM is required to analyze its impact. See Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974). In the June 29, 1989, Land Report, at page 2, BLM stated that the pipeline "would establish a corridor for future similar uses," thus limiting the impact from multiple rights-of-way. See 43 U.S.C. § 1763 (1988).

Therefore, we conclude that BLM, in determining whether to grant the subject right-of-way, considered the impact of not requiring Simplot to operate the subject pipeline as a common carrier. 15/ Moreover, we hold that appellant has not demonstrated that BLM should have conditioned the subject right-of-way grant by requiring operation of the authorized pipeline as a common carrier because to do so was necessary to protect competition, future development of phosphate reserves or the environment. 16/

15/ By order dated Feb. 2, 1990, we denied appellant's request for a hearing, but noted that "[i]f, * * * when the Board takes up active consideration of the subject appeal, it concludes that a hearing would be warranted an appropriate order will so issue." Throughout the course of our review of the merits of the appeal, we have not discovered any issue of material fact that requires a hearing. Accordingly, the request is denied. See Woods Petroleum Co., 86 IBLA 46, 55 (1985).

16/ In its answer, at page 8, Simplot states that it "will seek attorney's fees and costs against John D. Archer because his Appeal is frivolous." (Emphasis added.) In a later-filed motion, Simplot has asked for an award

BLM may condition a right-of-way so as to protect against future circumstances. For example, BLM may provide for the preservation of cultural resources should they be discovered during the course of right-of-way operations. See Water Users Association No. 1, 108 IBLA 166, 167-68 (1989). However, we find no justification for conditioning a right-of-way so that it is burdened with an accommodation to circumstances which may never come to pass. See James B. Loonan, supra at 398.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge

fn. 16 (continued)

of "costs and fees." See Motion filed July 29, 1991, at 5. We do not read these pleadings as constituting either a present request for attorney's fees and costs or, in any case, a request for such fees and costs under the Equal Access to Justice Act, as amended, 5 U.S.C. § 504 (1988). Under the Act, costs and fees may only be awarded against the United States in an "adversary adjudication." See 43 CFR 4.601. An appeal, such as this one, is not an "adversary adjudication," subject to the provisions of the Act. See Ann Marie Sayers, 115 IBLA 40 (1990).